SUPREME COURT, U. S.

DEC 1 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-7821

ARCHIE PELTZMAN,

Petitioner,

v.

CENTRAL GULF LINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARCHIE PELTZMAN,
Petitioner, Pro Se,
8725 16th Avenue,
Brooklyn, N. Y. 11214

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUES INVOLVED	3
STATEMENT	4
A. The hearing on May 30th, Oct. 15, 18, 1974.	5
B. The second decision of the Court of Appeals. (App. B33)	6
C. The pleadingsof the respondent were a fraud on the Court.	10
D. The Pleadings of the Petetioner in the U.S. Supreme Court in two related cases	12
Reasons For Granting the Writ	13
CONCLUSION	21
APPENDIX A&B	
U.S. Court of Appeals Opinions dated May 21, 1974 & July 24, 1975.	22-32
APPENDIX C&D	
District Court opinions dated ..... Jan. 7, 1974 & Dec. 5, 1974.	33-50

APPENDIX E — Page

Notice of Appeal Oct. 30, 1975 .. 50a

APPENDIX F

Petition for rehearing denied Sept. 2, 1975 51

APPENDIX G

Petition for rehearing denied Sept. 2, 1975 52

APPENDIX H

Petition for stay of mandate denied Oct. 30, 1975 53

APPENDIX I

Notice of Appeal dated Oct. 30, 1975 ..51

CITATIONS

Page

Anderson v Shipowners Assn, 272 US359(1926) 17A

Brown v. National Union of Marine 9

Cooks & Stewards Vo. VII 1070, 104 F Supp 685 9

Bulk Carriers V. Arguelles 400 US 358, 1971. 9

Blanco V. Phoenix Companies De Navegacion SA CA 4Va 304 F2 13 9

OIL CHEMICAL & ATOMIC WORKERS V Page

MOBIL Oil Corp CA 5 504, 272,

43LW 3226 ..... 13.15

NMU V. NLRB, 175F_2dG86

Certden, 338US 954 18

Peltzman V. Amercian Radio

Association. Oct terms 1972, No.

72-1080 12

Peltzman V. Central Gulf Lines 86LRRM

2127, 1974 12

Peltzman V. Central Gulf Lines

497F_2d 332 12

Peltzman V. NLRB US 20

Supreme Ct 71-1573 .....

Radio Officers Union V. NLRB 347US17

1954 19

Pennisular & O. SS Co. V. NLRB

98F_2d411 8

Southern SS Co. V. NLRB,316 US 31..... 9

36US31 9

Texas Co. v. N.L.R.B. 120 F 2^d 186 8

STATUTES

Page

Labor Management Reporting and Disclosure Act of 1959, Sec. 10 (a) (4) 73 Stat. f22, 29 USC 411 (a) 4.... 5

National Labor Relations Act as amended 61 Stat. 136, 73 Stat. 519, 29 USC 151 et seq 3

General Maritime Law Title 46 Sec. 599a 8

Norris LaGuardia Act..... 6

MISCELLANEOUS

FEDERAL RULES OF CIVIL PROCEDURE 16

FEDERAL SUMMARY JUDGMENT RULE ..... .14

CONGRESS & THE NATION VO.1,1945-64 labor legislation 18

ENCYCLOPEDIA BRITTIANICA (1971)..... 18

UNION SECURITY -SECTION 4 (b),The company agrees ,as a condition of employment,that all employees in the bargaining agreement unit shall become and remain members of the Union thirty (30) days after date of hiring.(p 23)of bargaining agreement.) .. 4

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No.

Archie Peltzman,

Petitioner

v.

Central Gulf Lines Inc.,

Respondent

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second circuit

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The petitioner, Archie Peltzman, pro se, petitions for a writ of certiori to review the decisions of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The two opinions of the Court of Appeals are attached,(App. A and B). The opinions of the District Court are attached,(App. C and D)

The first opinion of the Court of Appeals is reported at 497 F.2d 332. Petitioner has no knowledge if the second opinion has been reported. The first District Court opinion is cited in 86 LRRM 2127, 1974; not officially reported. The petitioner has no knowledge of the second District Court being reported.

JURISDICTION

The decision of the Court of Appeals was rendered on July 24, 1975 per curiam. Judgement was filed on July 24, 1975. A timely petition for rehearing and request for rehearing en banc was filed on August 5, 1975. This petition was denied on September 2, 1975, and the order denying petition was filed September 2, 1975. A timely petition for stay of mandate was filed on September 8, 1975. This was denied and the order denying the stay of mandate was filed on October 30, 75. The mandate issued on October 30, 1975. (App. E & F)

The jurisdiction of this Court is invoked under 28U.S.C.1254(1),and Article III Sec.2,

of U.S. Constitution. The notice of Appeal was filed in Court of Appeals on Nov.3, 1975.

QUESTIONS PRESENTED

The basic question is, Can a Statutory Federal Maritime right be abridged by a contractual agreement which is based on a state law permitting bargaining agreements that force an employee to join and remain a union member or suffer loss of his employment, for not adhering to those rules.

A subsidiary question is when such a conflict arises, which law is supreme? Federal Labor, State Labor, or Federal Maritime Law?

STATUTES INVOLVED

Section 7 and 8 b (1) of National Labor Relations Act, as amended 29 U. S. C. 157,158 (b) (1) provided in pertinent part as follows:

> Sec.7. Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall have the right to refrain from any or all such activities

Title46 Sec. 599(a) provides in pertinent

part.

> "...If any person shall demand or receive either directly, or indirectly, from any seamen or other person seeking employment as seaman, or from any person on his behalf, anyremuneration whatever for providing him with employment, he shall for every such offense be deemed guilty of a misdemeanor and shall be imprisoned not more than six months or fined not more than $500.00.

STATEMENT

Petitioner accepts the statement of the case as outlined in the Court of Appeals first opinion in the first paragraph(App. A 21) and adds that for two and one half years the union condoned his refusal to pay the initiation fee and it was only when they had the leverage, i.e. shipping declined and union members were unemployed in 1971, that they forced petitioner off the ship he was permanently assigned to (J.A. 40, p.40 in first appeal) by refusing to give him a"clearance" to rejoin the ship to which he left for vacation according to the union's rules and regulation. The company refused to rehire him claiming the union security clause prevented them from rehiring him and the pet-

itioner has been unemployed since 1971 because of the closed shop, preferential prehire-exclusive hiring hall agreementin the maritime industry.

The first year he sailed as a permit card member because the union's rules and regulationsso declare. Petitioner argues the National Labor Relations Act gives the petitioner the right to refrain from any or all of the union's activities, that includes membership or payment of dues or fees, and the permit system is discriminatory and is contrary to the Landrum Griffin Act which protects his rights to refrain from any or all activities of the union and that includes membership in the union as a condition of employment, after 30 days.

A - The hearing on May 30, Oct 15, 18, 1974. The petitioner relies on the Law of the Case as enunciated in the first opinion of the Court of Appeals (App Ap39), that unless the union treated the petitioner in the same manner as Homer (the only other seaman similarly situated according to the affidavit of Smith *(Tr 29), then the union treated

* Tr refers to transcript of May 30, Oct 15, 18, 1974 bound in one volume, hearing on remand.

Homer differently then petitioner.

The District Judge trys to explain this difference away by saying Homer's attorney threatened a law suit and so the union decided to settle for $1,000.00 instead of $2,000.00. (APP. D. P.46).

The petitioner argues that whatever the reason for treating Homer differently than petitioner, the treatment was different, therefore, the union arbitrarily punished the petitioner and rewarded Homer because Homer had a lawyer and petitioner did not have one. Homer compromised his statutory rights, and petitioner stood on his rights as a seaman, protected by the public policy of this Government which says that a "yellow dog" agreement will notbe enforced in any Court of the United States. See the Norris LaGuardia Act.

B - The second decision of the Court of Appeals (App B21-24)

(a) This decision conthains not one case to substantiate the hold-

ing that the Dist.Ct. properly granted summary judgment to the respondent.

Petitioner argues that neither in the Ct. of Appeals opinion or the Dist. Ct's. decision (App D33-50 are there any rebuttals of petioners arguments in his pleadings that there were issues of fact in this case that precluded summary judgment for the respondent, especially where the first summary judgment was reversed and remanded, the Law of the Case prevented the Dist. Ct. from granting it to the respondent a second time on the same identical issue .

Were the rules & regulations in the bargaining agreement discriminatory of petitioners rights under the MaritimeLaw & under the National Labor Relations Act & the Landrum-Griffin Act, & was the union security clause invalid as applied to a seaman?

Petitioner asks how could the respondent discharge him in 30 days if he was under the shipping articles & the shortest trips he made was three months from North Carolina to Vietnam?

Could the respondent say to him when he arrived in Vietnam that because he was not a member of the union he would have to leave the ship? The shortest duration of the articles he signed was for one year to Pacific Ports & or AustraliA. Is it equitable that a seaman should have to work for one year if the ship did not return to a U.S. Continental port before that time, & the employer should have the right to discharge him after 30 days if he refused to join a union, when the ship returned in 3 months?

(b) The pleadings of the petitioner in both Briefs & in the motions & Memorandum"s of Law he filed show what the law is & he enumerates them here.

1. He claims that Maritime Law is supreme when in conflict with the National Labor Relations Act citing Peninsular & O. SS v. N.L.R.B. 98 F 2d 411 & also Texas Co. v. N.L.R.B. 120 F 2d 186 (2nd Brief p 28)

2. He claims that formal signing off shipping articles on termination of voyage was not conclusive on question whether

seamen had been discharged on the ship's return to home port, but tenure of their employment was required to be determined in the light of all the evidence concerning the employers custom & practices. Citing Southern S.S. Co. v. N.L.R.B. 316 U.S. 31 (2nd Brief p. 28).

3. He claims it is the statute & not the contract which is the measure of duty & liability & the employer may not take shelter under the contract if there is a showing of unfair practice, citing Brown v. National Union of Marine Cooks & Stewards reported in Court decisions N.L.R.B. Vo. V111, 1070, and 104 F Supp 685 (2d Brief p. 28)

4. He claims that in a long line of decisions reiterated in U.S. Bulk Carriers v. Arguelles 400 U.S. 358., 1971 this Court has held that the statutory sections of the General Maritime Law control a seaman's employment, & conditions of employment. See Blanco v. Phoenix Companies De Navegacion SACA 4 Va.

304 F 2 13, which collects the cases to the effect that seamen in modern times still get protective care particularly with regard to their employment. Holding in Blanco is that a seaman who had a liability limit in his employment contract of $1,800.00 re any injury was not bound by same. (Petition for rehearing en banc p. 8)

C. The pleadings of the respondent were a fraud on the Court.

a. The respondent filed an exhibit in the first summary judgment motion entitled National Agreement between American Radio Association, AFL-CIO & Various Companies, Agents & Associations representing Gulf & Pacific Coasts representing owing & operating Dry Cargo & Passenger Ships. On page 66 of that Exhibit (App App p. 86) the respondent deleted the following para (d) which was a rehiring provision in the agreement after six

months of continuous service, which entitled petitioner to a vacation, & substituted an innocuous para. (f) relating to accepting vacation benefits while there was a shortage of Radio Officers. The paragraphs are shown here side by side to show the differences & the meaning therein.

The original paragraph deleated:	The inserted paragraph:
(d) Radio Officers & Electronic Officers shall have the right after (6) months of continuous employment to have a special leave of absence granted of one trip off with no pay. Such special leave shall not be considered as a break in service for any purpose.	(f) Unless & until the Union notifies the companies that there is no shortage of RO or REO, RO and/or REO when eligible for vacations may accept their vacation benefits & if they so Choose , & subject to the written consent of the Union, to continue in covered employment aboard a vessel or to return to covered employment during the

(emphasis supplied) | period of their vacation or any part thereof.

D- The Pleadings of the Petitioner in the U.S. Supreme Court in two related cases.

(a) The petitioner asks the Court to take judicial notice of his pleadings in Peltzman V. National Labor Relations Board Oct. term 1972 No. 71- 1573, & the Memorandum For the National Labor Relations Board in opposition. Also Peltzman V. American Radio Association Oct. term 1972 No. 72-1080. There was no brief filed in opposition by the union.

(b) Petitioner pleaded in those cases that he never had been notified of any ex-

*APPELLANTS APPENDIX Second Appeal

pulsion & that he had an inactive assignment supplied by the union while his case was being decided by the U.S. Coast Guard.

(c) The pleadings in the present case show that the union in 1950 had not expelled him since under their rules they could not do so. The dues sheet, supplied by the union (App. App. p.56a) shows a suspension dated Mar 31 1950. However Mr. Altman (NLRB attorney) informed the petitioner that he had been expelled on that date when the record supplied by the union shows it was a suspension, not an expulsion.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below affirming the Dist. Court's granting of summary judgment a second time in a seamans case after a reversal & remand in the first case is clearly erronneous.

(a) The federal summary judgement rule 56 (c) provides that the, " judgement sought shall be entered forthwith if the pleadings, depositions, & admissions on file, together with the affidavits, if any, show that except as to the amount of damages, there are no genuine issues as to any material fact, & that the moving party is entitled to judgement as a matter of law.

Petitioner argues that his pleadings in this writ show that issues of fact as to the very agreement relied on here, are in question. What does the agreement mean? Which part of the agreement is the paragraph originally in the contract; was it deleted & substituted for.?No findings of fact as to the rules & regulations were made in this case. Petitioner claims that the rules as to automatic suspension & automatic expulsion are ultra vires. He claims he does not have to join a union in order to pursue his job as a

seaman. The District Judge made no conclusions of law as to these issues.Petitioner claims that as a seaman, the arbitration clause does not comcern him since the U.S. Arbitration Act specifically exempts seaman & transportation workers from arbitration clauses relating to their employment. No.finding of fact as to this issue was made.

2. The very same issue, ie union security is soon to be heard in this Court in No. 74-1254, Oil Chemical & Atomic Workers V. Mobil Oil Corp., CA5 504 272, 43LW 3226 Ruling Below.

Texas right to work law bars agency shop for seamen whose employment related contacts with Texas are greater than those with any other state, even though only 43% of them are Texas residents & even though all of them spend at least 80% of their working time at sea.

(a) This holding is in direct conflict with the 2nd Circuit Court of Appeals, which held in petitioners case that he had to join the union & pay the dues & fees required by the union, & obey the rules & regulations of the union, or he would be discharged. Petitioner refused to pay & join the union & even though he paid dues for three and one half years, & welfare & pension payments were paid on his behalf into the unions treasury, he was discharged after a vacation, even though the delaeted paragraph in the bargaining agreement holds that,"such special leave shall not be considered as a break in service for any purpose"(p.11).

3. The Rules of Civil Procedure in this case were ignored, & the only order that the Dist. Court made was two summary judgement orders. He failed to rebut petitioners arguments as to the closed shop in the Maritime Industry & prevented him from putting into the

record evidence relating to those conditions (Tr 1) Q. By Mr. Peltzman, "Mr. Benson, How long have you been in the Maritime business? A. Roughly around 29 years. Q. So you know the ins & outs of the business, right? A. Yes. Q. And I am going to ask you to give me your straight forward opinion as to whether or not an agreement between Central Gulf & the Union is a closed shop agreement.

Mr. Lerner,"I object your Honor".

The Court,"Let him finish his question".

Q. Is it a closed shop agreement?

The Court,"That is his opinion".

Mr. Peltzman,"Thats all I am asking. He has been in the business....

The Court,"I don't care what his opinion is,. The Court of Appeals has said it's valid for the purpose of this case. Whether it's closed shop or open shop, what difference does it make what his opinion is ?" End of quote.

Petitioner alleges that the bargaining agreement is similar to the agreement condemened in Anderson v Shipowner's Association of the Pacific Coast,et al 272 US 359 (1926). The agreement there was also a control of hiring,and this court ruled that the anti-trust was violated when an association was formed to supply seamen to vessels,and only those assigned by the association were hired. the only difference between the union agreement,and the agreement which was condemened in 1926,is that the association issued a grey assignment card,and this union issues a pink assignment card.(Pleadings in the first appeal brief p 29-30).

THOUGH THE HIRING SYSTEM IS THE SAME SYSTEM, THE CONTROL IS DIFFERENT NOW.But the shiping companies dont mind this control,because of the heavy subsidies that the U.S. Government provides.The Central Gulf Steamship company has just built two modern vessels with two more planned,allpart of the Governments plan to modernize the U.S.Merchant Marine.

Petitioner argues that it makes a big difference whether the Maritime Industry is a closed shop since Congress has refused to legalize the Maritime hiring hall in the Maritime Industry. See petitioners pleading in both appeal briefs of six Court cases wherein the NLRB enjoined this union (American Radio Association), from discriminating against seamen who were not members, or who were delinquent in their dues. (P33,32, in 2d Brief) & (P.34,18,24,21 in first Brief).

See the closed shop Article in Encyclopedia Brittanica (1971), Reference to building & Maritime industries being closed shop industries (P. 34 first Brief on appeal).

See Congress & the Nation Vol. 1, 1945-64 Labor Legislation P. 588.

Congress was urged to legalize hiring halls after U.S . Supreme Court refused certiorari in N.M.U. V. N.L.R.B. 175F2d686 cert. denied , 338US 954, but Congress

refused to do so.

The petitioner wishes to show the Court the evasions & lies of Mr. Smith the Secy. Treasurer who on page 203 of Transcript said he didn't know who the four seamen were whom the NLRB charged, were discriminated by the union in a court case in the second Circuit Court of Appeals that petitioner certified & used in his pleadings opposing summary judgement.

The man who charged the American Radio Association, in 1955, with unfair practices* (App 25-28) was Fred Howe, the General Sec. Tres. of the Radio Officers Union whose union had discriminated against William Fowler in the case of Radio Officers Union V. NLRB 347US17 1954. He subsequently patched up his differences with the American Radio Association (Tr 200-210), & the NLRB testimony taken in this case was sealed up &

* No joint appendix was filed below & costs of over Eight hundred dollars has beenassesed against petitioner in this case.The exact amOunt is 978.30,and the interst is piling up.

nobody knew about this case, even at the NLRB. See my case cited in Peltzman V. NLRB U.S. Supreme Ct. 71-1573, p.23(bottom of the page). Quote: A decree filed by NLRB against A.R.A. Docket No. 24737 (Appendix M). Decree filed July 16, 1957. The record in this case is not available in the published volumes of this Court. (2d Circuit Court of Appeals). Enquiry to the New York office & Washington office of the NLRB has to this date, May 8, 1972, been not forthcoming, so petitioner has no idea what this case is about. End of Quote.

Petitioner adds the information that this Ct. when it denied certiorari in Peltzman V. NLRB (supra) also was not informed by the NLRB in their opposing memorandum what this case was all about. They claimed petitioner had been expelled in 1951.The evidence here shows a suspension. (Appellant's Appendix p 56a).

CONCLUSION

The judgement of the Court below affirming summary judgement dismissing the complaint of this petitioner, should be reversed, & the case remanded.

Respectfully Submitted

Nov. 30, 1975

Archie Peltzman

Archie Peltzman
Petitioner, Pro Se.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 831—September Term, 1974.

(Argued April 28, 1975 Decided July 24, 1975.)

Docket No. 75-7004

ARCHIE PELTZMAN,

Plaintiff-Appellant,

—against—

CENTRAL GULF LINES, INC.,

Defendant-Appellee.

Before:

MOORE and MANSFIELD, *Circuit Judges*, and HOLDEN, *District Judge*.*

Appeal from an order of the United States District Court for the Southern District of New York, Whitman Knapp, *Judge*, granting summary judgment dismissing the complaint of a marine radio operator for damages for wrongful discharge.

Affirmed.

ARCHIE PELTZMAN, Brooklyn, N.Y., *Plaintiff-Appellant Pro Se.*

* Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

RICHARD P. LERNER, Esq., New York, N.Y. (Lorenz, Finn, Giardino & Lambos, New York, N.Y., of counsel), *for Defendant-Appellee.*

PER CURIAM:

This is the second appeal by Archie Peltzman, a marine radio operator, from an order of the Southern District of New York granting summary judgment dismissing his suit for damages against his employer, Central Gulf Lines, Inc., for wrongful discharge. Peltzman had been discharged pursuant to a union security provision in an outstanding agreement between his employer and the American Radio Association, AFL-CIO ("ARA" herein), the collective bargaining representative for marine radio operators employed by Central Gulf, on the ground that he was not a member of that union. The ARA had declined to clear Peltzman for permanent employment because he had been expelled as a member and had refused to pay a $2,000 initiation fee required to regain union membership.

Upon the prior appeal we upheld the validity of the union's security clause, which required that within 30 days of the date of hiring for a permanent position an employee become and remain a member of ARA, and disposed of most of the arguments advanced by Peltzman. *Peltzman* v. *Central Gulf Lines, Inc.*, 497 F.2d 332 (2d Cir. 1974). However, we were unable to gather from the district court's opinion whether the initiation fee "was uniformly required by the union constitution and by-laws, and was regularly demanded of those in his [Peltzman's] position." We could not therefore determine whether the union security clause had been properly invoked by Peltzman's employer. It was also unclear whether Peltzman

had remained a member of the union despite his admitted failure to pay dues arrearages.

Upon remand to determine whether genuine issues existed with respect to these matters Judge Knapp, after a hearing, concluded that no such issues were presented and that the defendant was entitled upon the undisputed facts to dismissal of the complaint as a matter of law.[1] We affirm.

It is uncontroverted that following the United States Coast Guard's wrongful refusal to issue a radio officer's license to Peltzman in 1949, which prevented him from continuing to act as a radio officer, Peltzman ceased paying his dues to ARA, of which he had been a member. Under the provisions of the ARA Constitution, Art. XII, §1(c), Peltzman was in 1950 automatically suspended for nonpayment of dues for six months. In 1952 the ARA Constitution was amended to provide that members who failed for six months to pay dues owed by them should automatically be expelled from union membership and that an expelled member might regain membership in the union only upon compliance with the Constitution's "Permit Card" provision, which required the expelled member to seek reentry as a new member, paying the initiation fee required of new members.

It is undisputed that from 1949 on Peltzman did not pay his dues. In reply to the foregoing provisions of the ARA Constitution, under which he was automatically suspended and later expelled, Peltzman contended in the district court that he was on "inactive status." However, he offered no evidence to support this contention, which was

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1 In view of Judge Knapp's conclusions it became unnecessary to consider whether Central Gulf Lines was also entitled to summary judgment on the ground that Peltzman had failed to exhaust contractual grievance procedures.

refuted by a provision of the ARA Constitution, Art. XII, §1(h), which entitled him to such a status only upon payment of all outstanding dues arrearages. Peltzman had admittedly not paid dues for many months prior to his alleged assumption of inactive status.

The evidence was equally clear and uncontroverted that the provisions of the ARA Constitution obligating those who had been suspended or expelled from membership to pay an initiation fee in order to obtain re-entry had been applied uniformly and in a non-discriminatory fashion. Of 10 individuals who had been expelled or suspended for non-payment of dues and who had subsequently returned to their former occupation as marine radio operators, all but one were required to pay the full ARA initiation fee as a prerequisite to obtaining membership in the union. One individual, Edward Homer, was reinstated upon payment of $1,000, which amounted to one-half of the initiation fee, pursuant to settlement of his threatened lawsuit against the ARA. For the reasons stated by Judge Knapp, Homer's case was distinguishable on several grounds from that of Peltzman, one ground being that Homer had not originally been suspended from the ARA but had received a withdrawal card, leaving the union as a member in good standing. All other individuals who had been expelled or suspended for non-payment of dues, however, had been required to pay the ARA initiation fee in order to regain membership.

The district court thus properly found that there was no genuine issue of material fact with respect to Peltzman's non-membership in the ARA and the non-discriminatory enforcement of the pertinent provisions of the ARA Constitution. Having upheld the validity of the union security clause in the ARA contract governing Peltzman's employment, we accordingly affirm the district court's grant of summary judgment dismissing the complaint.

APPENDIX B

26

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 942—September Term, 1973.

(Argued May 1, 1974 Decided May 21, 1974.)

Docket No. 74-1162

ARCHIE PELTZMAN,

Plaintiff-Appellant,

v.

CENTRAL GULF LINES, INC.,

Defendant-Appellee.

Before:

WATERMAN, FRIENDLY and MULLIGAN,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Whitman Knapp, *Judge*, granting defendant steamship company's motion for summary judgment in an action brought by a marine radio officer seeking damages and injunctive relief for the company's refusal to rehire him.

Reversed and remanded.

ARCHIE PELTZMAN, New York, N.Y., *Plaintiff-Appellant, Pro Se.*

RICHARD P. LERNER, Esq., New York, N.Y. (James A. Flynn, Esq., and Lorenz, Finn, Giardino & Lambos, New York, N.Y., of Counsel), *for Defendant-Appellee.*

PER CURIAM:

Archie Peltzman, a marine radio officer, brought this action in the District Court for the Southern District of New York, seeking damages and injunctive relief against his former employer, Central Gulf Lines, Inc. Appearing pro se, Peltzman raised a myriad of claims before the district court based on maritime law, the New York and federal constitutions, the antitrust laws, and the collective bargaining agreement between the employer and Peltzman's union, the American Radio Association. In essence, his claim was that the employer unlawfully acceded to a union request that he be discharged for failing to pay a $2,000 union initiation fee.

I.

The facts, as appellant presents them, are as follows: From 1943 through 1949, Peltzman was a member of the American Communications Association, the predecessor of the American Radio Association. In 1949 the Coast Guard refused to issue him a radio officer's license on the ground that he was either a member of the Communist Party or a communist sympathizer. Without a license, Peltzman was ineligible to serve as a radio officer in the Merchant Marine. In 1967, he brought an action in federal court in the course of which the Coast Guard agreed to reissue him a license, see *Peltzman* v. *Smith*, 404 F.2d 335 (2 Cir. 1968). He subsequently sought reinstatement in the union as a full-fledged member. At that time, the union issued him a permit card which entitled him to sail for a year

without having to pay the union's $2,000 initiation fee. At the end of the year, however, the union demanded that Peltzman pay the fee. Peltzman refused, insisting that since he was a former member of the union, he should be liable only for a "withdrawal fee" equal to one year's dues. Others who had rejoined the union after a long layoff, Peltzman insisted, had not been required to pay the full initiation fee.

Before the dispute was settled, Peltzman received a permanent assignment on the S/S Green Ridge, one of Central Gulf's vessels. He made three trips on the Green Ridge and then requested a one-trip vacation leave, as provided for in the collective bargaining agreement. At that time, the union demanded the $2,000 initiation fee and the employer indicated that he would not be rehired without obtaining clearance from the union. Peltzman then began a series of legal actions in an effort to save his job. He first took his claim to the National Labor Relations Board. When the Regional Director declined to file a complaint with the Board and the General Counsel affirmed the Regional Director's decision, Peltzman appealed to this court. We dismissed the appeal from the bench, and the Supreme Court denied certiorari. *Peltzman* v. *NLRB*, No. 72-1091 (2 Cir.), *cert. denied*, 409 U.S. 887 (1972).[1] While his claim was pending before the General Counsel, Peltzman brought suit against the union in the New York courts. The trial court declined jurisdiction over the matter, holding that it was within the exclusive jurisdiction of the Board, and the appellate division affirmed without opinion. *Peltzman* v. *American Radio*

1 Our summary dismissal of Peltzman's appeal was doubtless based on the well-settled principle that the General Counsel's determination not to issue a complaint on an unfair labor practice charge is unreviewable, see *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *United Electrical Contractors Ass'n* v. *Ordman*, 366 F.2d 776 (2 Cir. 1966), *cert. denied*, 385 U.S. 1026 (1967).

Association, 69 Misc.2d 17, 327 N.Y.S.2d 505 (S.Ct. N.Y. Co.), *aff'd*, 335 N.Y.S.2d 998 (1st Dep't 1971), *cert. denied*, 411 U.S. 910 (1973).

Failing to obtain relief in those two forums, Peltzman next brought his case to the federal court. In the court below, however, he fared no better than in his previous efforts. On defendant's motion, the district court granted summary judgment against Peltzman on at least three independent grounds. First, the court held that since his complaint was founded on conduct that would arguably constitute an unfair labor practice, Peltzman's claims were subject to the exclusive jurisdiction of the National Labor Relations Board. Second, it held that the judgment against him in the New York courts operated as a jurisdictional bar to his maintaining the action in federal court. The court next suggested that since the General Counsel had refused to issue a complaint on Peltzman's application, he would probably be barred from bringing this action in court.[2] On the merits, the court concluded without discussion that "defendant's refusal to rehire plaintiff was lawful under the circumstances." The court did not reach the further defense that Peltzman had failed to exhaust contractual grievance procedures and that such failure should bar his present action. On that point, the court held that the exhaustion defense raised material disputed issues of fact. We reverse the judgment of the district court and remand for a determination whether the collective bargaining agreement provides Peltzman any basis for relief.

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2 The district court expressed some doubt that the General Counsel's refusal to issue a complaint would provide an independent basis for granting summary judgment, but held that since the action was subject to the Board's exclusive jurisdiction, it did not have to decide the effect of the General Counsel's decision.

II.

Most of Peltzman's arguments can be dealt with summarily. Nothing in maritime law renders illegal a discharge that is authorized under a legitimate union security clause. There is no colorable basis for an antitrust claim in this case. The security clause here is not subject to attack under the federal or New York constitutions, see *NLRB* v. *General Motors Corp.*, 373 U.S. 734 (1963); *Buckley* v. *AFTRA*, —— F.2d —— (2 Cir. 1974), slip opinions at 3073; *Linscott* v. *Millers Falls Co.*, 440 F.2d 14 (1 Cir.), *cert. denied*, 404 U.S. 872 (1971). And any claim that the company has committed an unfair labor practice in discharging him would plainly be subject to the exclusive jurisdiction of the NLRB.

Peltzman's breach of contract claim, however, is not so easily dismissed. While his pleading is not as concise as could be hoped, his breach of contract claim is founded on his assertion that he *was* a member of the union when he was discharged, and that the union was thus not entitled to demand an initiation fee from him—a demand which he alleges was not made of others in his position, see *Cunningham* v. *Erie R.R.*, 358 F.2d 640, 643-45 (2 Cir. 1966). If his allegations are correct, the union security clause in the collective bargaining agreement would not authorize his discharge, and other provisions, such as the non-discrimination clause, would arguably provide him a contractual basis for regaining his job.

It is well settled that contract claims brought under § 301(a) of the Labor Management Relations Act are not subject to preemption by the National Labor Relations Board, see *Smith* v. *Evening News Association*, 371 U.S. 195 (1962); *Humphrey* v. *Moore*, 375 U.S. 335 (1964) (breach of duty of fair representation cognizable under § 301(a) if it involves a violation of the collective bargaining agreement). Similarly, the decision of the General

Counsel not to file a complaint on Peltzman's behalf has no res judicata effect, as it is not a final judgment on the merits, see *Aircraft & Engine Maintenance Employees, Local 290* v. *E.I. Schilling Co.*, 340 F.2d 286, 289 (5 Cir. 1965), *cert. denied*, 382 U.S. 972 (1966); *Thomas* v. *Consolidation Coal Co.*, 380 F.2d 69, 77-78 (4 Cir.), *cert. denied*, 389 U.S. 1004 (1967); *International Union of Electrical Workers* v. *General Electric Co.*, 407 F.2d 253, 264 (2 Cir. 1968), *cert. denied*, 395 U.S. 904 (1969). Finally, the New York court's jurisdictional dismissal of Peltzman's action against his union does not bar him from bringing this suit. The New York court apparently dismissed his action against the union on the ground that Peltzman had alleged only unfair labor practices. Had he raised an independent federal claim, such as a breach of the duty of fair representation, it would clearly have been cognizable in that forum, see *Vaca* v. *Sipes*, 386 U.S. 171, 176-84 (1967); *Amalgamated Association of Street Employees* v. *Lockridge*, 403 U.S. 274, 299-301 (1971).[3]

Peltman's claim on the merits may well turn out to be without force. If the initiation fee was uniformly required by the union constitution and by-laws, and was regularly demanded of those in his position, then it is likely that the union security clause was properly invoked and that the contract claim must fail. While the district court may have explored these possibilities below, we are not confident that its brief statement that "the defendant's refusal to hire plaintiff was lawful under the circumstances" reflects a careful consideration of Peltzman's contract claim and a determination that he had raised no material questions of

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3 The state court apparently placed some weight on the fact that Peltzman's unfair labor practice claim was still pending before the General Counsel, 69 Misc.2d at 22, 327 N.Y.S.2d at 510. In light of that consideration, we think it particularly inappropriate to accord the state court decision any preclusive effect in this suit.

fact on that issue.[4] We therefore remand this case for the district court to determine whether Central Gulf breached the collective bargaining agreement, and, if so, whether Peltzman's apparent failure to exhaust contractual grievance procedures should bar him from maintaining this suit.[5]

Reversed and remanded.

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4 Had the defendant addressed itself more directly in its moving papers to Peltzman's contract claim, it might have been able to establish that there was no factual dispute over Peltzman's status as a union member. However, the defendant chose to stress the collateral estoppel and res judicata elements of this case and to present only brief and conclusory allegations concerning the merits of the contract claim.

5 Peltzman argues that he should be excused from the normal requirement that he exhaust the contractual grievance procedures, see *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965), because it was the union that instigated the company's alleged breach of contract. If the district court should find that Peltzman's contract claim is a good one, it should then determine whether he should be excused from the exhaustion requirement because of a breach of the duty of fair representation by the union, *Vaca* v. *Sipes*, 386 U.S. 171 (1967), or because his pursuit of grievance proceedings, through the union, would plainly have been futile, see *Glover* v. *St. Louis-San Francisco Ry.*, 393 U.S. 324 (1969).

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARCHIE PELTZMAN,

Plaintiff,

-against-

CENTRAL GULF LINES, INC. (sued herein as "CENTRAL GULF STEAMSHIP CO."),

Defendant.

OPINION

73 Civ. 2911
Pro Se

A P P E A R A N C E S :

ARCHIE PELTZMAN,
Plaintiff Pro Se
8725 16th Avenue
Brooklyn, New York 11214

LORENZ, FINN, GIARDINO & LAMBOS
Attorneys for Defendant
21 West Street
New York, New York 10006

KNAPP, D.J.

This is an action brought pro se by a maritime radio operator for damages and injunctive relief based on defendant's refusal to rehire him. The refusal was based on the requirements of the union security clause of the collective bargaining agreement between defendant & the American Radio Association, to which association plaintiff used to belong until he was expelled for non-payment of dues.

Defendant moves for summary judgment on the following grounds:

1. According to Motor Coach Employees v. Lockridge(1971) 403 U.S. 274 & other decisions, the National Labor Relations Board has exclusive jurisdiction over plaintiff's claim, because defendant arguably committed an un-fair labor practice in refusing to rehire plaintiff, which is the standard for exclusivity.

2. The doctrine of collateral estoppel requires dismissal for lack of subject-matter jurisdiction in that an action brought by this plaintiff in the New York State courts for the identical grievance against the ARA was dismissed for want of jurisdiction on the ground of preemption by the NLRB., Peltzman v. ARA (Sup. Ct. Special Term,N.Y. County 1971) 69 Misc. 2d 17, 327 N.Y.S. 2d 505, aff'd. 335 N.Y.S. 2d 998.

3. The National Labor Relations Board upon investigation into plaintiff's grievance refused to issue a complaint against defendant on the ground that"The evidence establishes that the Company refused to re-hire(you).... pursuant to a valid Union security provision between it and the (ARA) because of your failure to remit initiation fees after notification by the latter that such fees were due and not for any reason pro-

ibited by the aforesaid (NLRA)." Appendix A to defendant's supporting Memorandum of Law.

4. On the merits, defendant's refusal to rehire plaintiff was lawful under the circumstances.

5. Plaintiff has not exhausted internal Union grievance procedures.

Defendant's motion is granted on all grounds save the last, as to which the Court believes there are material issues of fact in dispute. As to the other four grounds, only the third is in any way troublesome. See e.g. 2 K. Davis, Administrative Law Treatise s 18.06, stating that a refusal by the NLRB to issue a complaint is not a final decision on the merits. However, given that in the instant case the NLRB has exclusive jurisdiction, we need not decide the impact of its prior actions. Plaintiff apparently concedes that his discharge flowed a fortiori from the Union security clause, but asserts that the clause is illegal and un-

enforceable. However, the authorities cited by plaintiff in support of that assertion are uniformly inapplicable. In Edwards v. S.O.G. A.T. (C.A. 1968), a British case relied on by plaintiff for example, Lord Denning does not challenge the validity of the closed shop per se, but only the arbitrariness & unfettered discretion sometimes abused by the trade unions operating as closed shops. Thus the court held invalid a blanket rule requiring the automatic termination of temporary membership after six weeks of arrears, without any opportunity for the temporary member to be heard. By any version of the facts in the case at bar, no such question is here presented.

Similarly 46 U.S.C. s594 has no application to the situation.

In view of the Court's disposition of this motion, it is not necessary to rule on plaintiff's prior motions for discovery nor on the motion by the NLRB to quash a subpoena. All now are moot.

The complaint is accordingly dismissed.

SO ORDERED.

DATED: New York, New York

January 7, 1974. /s/ Whitman Knapp
WHITMAN KNAPP, U.S.D.J.

APPENDIX D

UNITED STATES DISTRICT COURT

SOUTHERNDISTRICT OF NEW YORK

ARCHIE PELTZMAN, Plaintiff,	
v.	
CENTRAL GULF LINES, INC., Defendant.	OPINION
	73 Civ. 2911

A P P E A R A N C E S:

ARCHIE PELTZMAN
Plaintiff Pro Se
8725 16th Avenue
Brooklyn, New York 11214

LORENZ, FINN, GIARDINO & LAMBOS
Attorneys for Defendant
25 Broadway
New York, New York 10004
By: RICHARD P. LERNER, ESQ.,
OF COUNSEL

KNAPP, D.J.

This is an action by a licensed radio operator fo wrongful discharge. The plaintiff had entered into a contract of employment with the defendant, and claims that the defendant breached that contract by unlawfully discharging him. It is not disputed that the defendant operated under a collective bargaining agreement with the American Radio Association, AFL-CIO or that that agreement required that all permanent radio operators be members of the union or join the union within thirty days of the acceptance of permanent employment. Furthermore, there is no doubt that the union formally advised the defendant that the plaintiff, who had been permanently employed for more than thirty days, was not a member of the union, and that the defendant discharged the plaintiff pursuant to that representation. The only question presented is whether, such representation being a nullity, the defendant could not lawfully discharge the plaintiff pursuant thereto.

The background to the dispute between the plaintiff and the union can be simply stated: Plaintiff had been an active member of the union in good standing until 1949. In that year, the Coast Guard - unlawfully as it later turned out - refused to issue him a radio officer's license. Without a license, plaintiff was prevented from following his calling at sea. Plaintiff, accordingly, ceased paying his union dues, and in 1950 was, in accordance with the ARA Constitution, suspended for non-payment of such dues.

In 1967, plaintiff belatedly received his license from the Coast Guard and reported back to his union. The union immediately made temporary jobs available but told him that, having been suspended (and later expelled pursuant to appropriate amendments of the Constitution) for non-payment of dues, he would have to pay the current initiation fee - then $2,000 - before he could be considered a member in good standing, and thus be considered for permanent employment aboard vessels subject to union contract.

The plaintiff took the position that the union - for a wide variety of reasons - had no right to require the payment of initiation fees from him or from any other radio officer similarly situated. He unsuccessfully urged this position before the union, the National Labor Relations Board, and the New York State courts.

Based on the foregoing undisputed facts, the defendant moved before me for summary Judgment claiming that its contract with the plaintiff incorporated the terms of the collective bargaining agreement, and that, accordingly, since the plaintiff was not a union member in good standing, he could not keep a permanent position on any ship operated by defendant.

In argument before me the plaintiff took two basic positions:

(1) that the "security clause" pursuant to which the union acted (which required him to be a member in good standing in order to hold a permanent job) was in violation of the Taft-Hartley and Landrum-Griffin Acts; and

(2) that regardless of the validity of the security clause, the union in the circumstances presented had no right to require the payment of an initiation fee.

I reviewed both of these contentions and granted the defendant's motion for summary judgment.[1/] The Court of Appeals agreed with my determination on both the above stated questions but, reading the plaintiff's complaint - to allege that he was a member of the union at the time of discharge, held that plaintiff's claim was susceptible of being supported by proof that the union had treated him in a discriminatory fashion - i.e. by demanding initiation fees from him and not from others similarly situated. Although no discriminatory conduct had theretofore been suggested by plaintiff, the Court of Appeals remanded the case to explore the possibility of the existence of an issue of fact on that theory.

1/ I also committed the superfluous error of misreading Motor Coach Employees v. Lockridge (1971) 403 U.S. 274, 91 S. Ct. 1909, 29 L.Ed. 2d 473, and ruling that the National Labor Relations Board had exclusive jurisdiction in the matter; and that in any event plaintiff was precluded as a result of his prior litigation against the union in the New York Courts.

For the reasons which follow, I have concluded that no such issue can be found and reinstate my original order granting the defendant's motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure.

At a "pre-trial" conference following the remand, the defendant Central Gulf Lines asserted that it wished to renew its motion for summary judgment upon affidavits conclusively establishing that the union had not treated the plaintiff in any discriminatory fashion. I accordingly established a procedure whereby the defendant would have a specified period of time within which to make such an amended motion, and that the plaintiff should advise my chambers when he was ready to reply. I indicated that, since plaintiff was acting pro se, the reply need not be formal or even in writing, but that - when he was ready for it - I would conduct a hearing at which he could produce any evidence and examine any witnesses he thought appropriate.

It was specified that such a hearing would not be for the purpose of determining any issue of fact but nerely for the purpose of smoking out the existence of such an issue.

After adjournments for a variety of reasons, the hearing was held before me on oct. 15 & 18, respectively. The proceedings lasted nearly six hours & plaintiff was afforded the opportunity both during & after the hearing to examine any available relevant documents. Much irrelevant testimony was adduced, but so far as relevant, it was established that the union consistently enforced its requirement for the payment of initiation fees upon all members who had been suspended & (pursuant to later amendments of the Constitution) expelled for non -payment of dues.

2/ In his post-trial memorandum, plaintiff discusses the case of a Mr. Spoonmore, a radio officer who was suspended in the 1940's for non-payment of dues and reinstated in 1951 after paying a fee of only $180.00. The case, however, is not analogous to that of plaintiff's since the union constitution was amended only aft 1951 to require the payment of a new initiation fee for expelled members seeking re-admission to the union.

The only exception [2/] involved a radio officer by the name of Ed Homer who - in circumstances somewhat similar to the plaintiff's was required only to pay $1,000.00. The Homer situation will therefore be examined in detail.

Homer, like the plaintiff, was a victim of the Coast Guard's improper action in refusing to issue him a license, and was therefore also barred from following his calling at sea. However, unlike the plaintiff, he was not suspended from the union/ He followed the appropriate procedures(which included the payment of dues) and received a with-drawal card thereby leaving the union as a member in good standing. However, when Homer sought reinstatement after the Coast Guard finally issued his license, this circumstance proved to be of no avail. The union took the position that under its constitution, full initiation fees now had to be paid by members who had not kept up their dues, whether they had withdrawn in good standing or been expelled.

Like the plaintiff, Homer resisted this position.[3] After negotiations between Homer's attorneys and attorneys for the union, the parties agreed that the cost of litigation would be far in excess of the amount in question, & decided that it was best to settle upon an initiation fee of $1,000.00 for Mr. Homer instead of the $2,000.00 demanded.

In the first place, it seems clear that Homer was in a stronger litigating position vis-a-vis the union than was the plaintiff. Regardless of the technicalities involved, a former union member who when he was improperly ousted from his job- took the trouble to comply with the union's regulations & to withdraw in good standing could expect a more sympathetic judicial hearing than one who had simply permitted himself to be expelled.[4] Be that as

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3/ At the time Homer with-drew from the union, the union constitution did not require members in good standing to pay an initiation fee upon reinstatement.

4/ Plaintiff himself clearly recognized this distinction at the hearing. In fact, he seemed much more outraged at Ed Homer's treatment than at his own.

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it may, I can't believe that the circumstance that the union settled a dispute with one member rather than engage in protracted litigation would brand as "discriminatory" any attempt by the union to enforce its regulations against the rest of its members. This consideration becomes the more compelling in light of the conceded fact that this plaintiff never made any attempt to settle his dispute with the union. On the contrary he insisted on forcing the union to engage in the very litigation its settlement with Homer was designed to avoid.

The plaintiff has made a cross-motion for summary judgment which must necessarily be denied. However, it is worth noting that even if the plaintiff had prevailed in his cross-motion for summary judgment, he probably would have been unable to recover against the defendant because of an inability to show any damages. The principal witness called at the hearing was Bernard L. Smith, Secretary-Treasurer of the union. In a colloquy between the Court, the witness & the plaintiff, it was developed - and admitted by the plaintiff - that the union security clause was applicable only to <u>permanent</u> jobs and that the union made no effort to

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prevent any licensed radio operator - including the plaintiff - from getting temporary employment with its contractees. Mr. Smith pointed out that - as illustrated by plaintiff's own experience - the union maintained a hiring hall & actively assisted non-members in getting temporary employment . While this distinction between permenent & temporary employment might, in ordinary circumstances, have considerable economic significance, it had no such significance in the year 1971 when this particular breach of contract was alleged to have occurred. The Vietnam War was at its height, & according to Mr. Smith, any radio operator "who had a license & whose Heart was beating"[5/] could, if he wished, have held temporary jobs on union ships for 365 days a year. In the same colloquy, the plaintiff conceded that the only injury which resulted from the union's position was his inability to vote at

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5/ Mr. Smith's definition of the requirements for employment during the Vietnam War.

union meeting & hold office in the union - injuriesfor which he could clearly not hold the defendant Central Gulf responsible.

To sum up, the record conclusively establishes that the plaintiff at the time of discharge was not a member of the ARA becaused to pay an initiation fee that was uniformly required by the union constitution & regularly demanded of those in his position. Furthermore, the record shows that plaintiff was discharged pursuant to the ARA's valid union security clause.

Accordingly, I find that defendant has shown with regard to plaintiff's contract claim that there are no genuine issues as to any material fact, & that t defendant is entitled to a judgment as a matter of law, pursuant to Rule 56, Federal Rules of Civil Procedure.

SO ORDERED.

Dated: New York, New York
December 5, 1974.

/s/Whitman Knapp
WHITMAN KNAPP, U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ARCHIE PELTZMAN, Plaintiff-Appellant, -against- CENTRAL GULF LINES, INC., Defendant-Appellee.	Civ.ActionNo. 75-7004

NOTICE OF APPEAL

Notice is hereby given that A. Peltzman, the plaintiff appellant above named hereby appeals to the Supreme Ct. of the U.S. from the entire judgment dismissing the complaint entered in this action on October 30, 1975.

This appeal is taken pursuant to 28 U.S.C. Sect. 1254, (1), and 28 U.S.C. Drct. 1916.

Archie Peltzman

ARCHIE PELTZMAN, Pro Se

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Ct. of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of September, one thousand nine hundred and seventy-five.

Present:

Hon. WALTER R. MANSFIELD,
LEONARD P. MOORE,
Circuit Judge
JAMES S. HOLDEN,
District Judge

ARCHIE PELTZMAN,

Plaintiff-Appellant

v.

CENTRAL GULF STEAMSHIP CO.,

Defendant-Appellee

Doc.-No. 75-7004

75-7004

A petition for a rehearing having been filed herein by counsel for the plaintiff-appellant, ARCHIE PELTZMAN,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

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Appendix G.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Ct. of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of September, one thousand nine hundred and seventy-five.

ARCHIE PELTZMAN,

Plaintiff-Appellant

v.

Doc.- No. 75-7004

CENTRAL GULF LINES, INC.,

Defendant-Appellee

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for plaintiff-appellant, ARCHIE PELTZMAN, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/S/ Irving R. Kaufman
IRVING R. KAUFMAN, CHIEF

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court Of Appeals ,in and for the Second Circuit,held at the United States Cour t House,in the City of New York,on the thirtieth day of Octob er one thousand nine hundred and seventy -five.

Archie Peltzman,

Appellant,

v

Central Gulf Lines,Inc;

Appellee.

A motion having been made herein by Appellant,pro se for recall of the mandate,

Upon consideration thereof,it is order ed that said motion be and it hereby is denied.

s/ Leonard P.Moore
Leonard P.Moore U.S.C.J.

s/ Walter R. Mansfield,USCJ
Walter R. Mansfield U.S.C.J.

s/ James S. Holden,
James S Holden, U.S.D.J.

WRM LPM HOLDEN